

BEFORE THE
Federal Communications Commission
 WASHINGTON, DC 20554

MAR 25 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of the Commission's Rules)

to Permit Flexible Service Offerings)

in the Commercial Mobile Radio Services)

WT Docket No. 96-6

Reply Comments of
AirTouch Communications, Inc.

AirTouch Communications, Inc. ("AirTouch") hereby replies to comments filed in response to the Commission's Notice of Proposed Rulemaking issued on January 25, 1996.¹

As a major wireless services provider,² AirTouch supports the overwhelming majority of commenters that recommended adoption of flexible Commercial Mobile Radio Service ("CMRS") rules that allow provision of all types of fixed wireless services on CMRS frequencies.³ In addition to fixed local loop service, it is clear from the

¹ In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, FCC 96-17, released January 25, 1996 (hereinafter, "Notice").

² AirTouch provides cellular services in MSAs and RSAs throughout the United States. AirTouch and U S WEST NewVector Group, Inc. are in the process of completing a merger of their cellular interests. AirTouch is a partner in an A/B Block PCS licensee, PCS PrimeCo L.P. Through its subsidiary, AirTouch Paging, AirTouch is one of the largest paging service providers in the U.S., operating in twenty-nine states and the District of Columbia, and serving over 2.3 million units in service in 167 MSAs.

³ See, e.g., comments filed by Motorola, Inc., AT&T Corp., Nextel, BellSouth Corporation, American Mobile Telecommunications Association, PCIA, CTIA, SBC, U S WEST, Inc., 360 Communications, and the Commercial Internet eXchange.

comments that a myriad of other fixed services could be provided over CMRS frequencies — including more diverse service and pricing options for data users and Internet service providers, point-of purchase credit card verification, and electronic funds transfer, among others.⁴ In this regard, AirTouch agrees with SBC's suggestion that the Commission should clarify that its definition of 'wireless local loop' includes other fixed services.⁵ AirTouch believes that giving CMRS licensees flexibility to provide a host of fixed services will facilitate competition and allow for the deployment of innovative technologies and services, as long as the Commission continues to regulate CMRS carriers under Section 332 of the Communications Act, rather than imposing additional regulatory restrictions on CMRS providers.

I. All CMRS licensees can provide fixed services and remain within the CMRS regulatory framework

AirTouch agrees with the Commission and the majority of commenters in the instant proceeding that fixed services provided by CMRS licensees should be regulated as CMRS.⁶ The statutory authority for such treatment derives from Section 332 of the Communications Act, which defines "commercial mobile service" as any mobile service that is provided for profit, interconnected, and available to the public."⁷ Thus, in essence, if a service qualifies as a "mobile service," the preemption provisions of Section

⁴ CTIA aptly demonstrates the various fixed services implemented by wireless carriers. See CTIA Comments at 9, n. 18.

⁵ SBC Comments at 3.

⁶ See, e.g., comments of At &T, Corp., U S WEST, SBC, Go Communications, Omnipoint, and Sprint Spectrum, among others.

⁷ 47 U.S.C. 332(d)(1).

332 would apply.⁸ The definition of “mobile,” in turn, includes inter alia, “any service for which a license is required in a personal communications service established pursuant to the proceeding entitled “Amendment of the Commission’s Rules to Establish New Personal Communications Services” (GEN Docket No. 90-314, ET Docket No. 92-100), or any successor proceeding.”⁹ The Commission has already made clear that PCS licensees will provide a variety of fixed and mobile services, including “advanced digital cordless telephone service, portable facsimile services, wireless PBX services, and wireless local area network (LAN) services, among others.”¹⁰ Even with these anticipated fixed uses, PCS was properly classified as a CMRS service subject to Section 332 regulation. There is no reason for the Commission to modify this approach in the instant proceeding.

Moreover, consistent with its statements in the PCS context, the Commission has also concluded that all auxiliary services provided by CMRS licensees should be included within the definition of mobile services.¹¹ This conclusion is based on the regulatory parity provisions of the Act,¹² which mandate that the Commission not distinguish between PCS licensees and other CMRS providers. PCS One, Inc.’s sugges-

⁸ For a detailed discussion of Section 332 and its legislative history, see CTIA comments at 9-11.

⁹ 47 U.S.C. 153(n)(3) (emphasis added).

¹⁰ Amendment of the Commission’s Rules to Establish New Personal Communications Services, 8 FCC Rcd 7700, 7712 (1993)(“Broadband PCS Order”).

¹¹ In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, GN Docket 93-252, 9 FCC Rcd 1411, 1424 (1994) (hereinafter, CMRS Second Report and Order).

¹² 47 U.S.C. 332.

tion that PCS services, but not cellular services, be permitted to provide fixed service is contrary to this regulatory parity mandate. The Congressional intent of Section 332 was to ensure that “consistent with the public interest, similar services are accorded similar regulatory treatment.”¹³ Although the Commission has discretion in this area, it also must “ensure that substantially similar services are subject to ‘comparable’ technical requirements.”¹⁴ The Commission has implemented this policy by viewing whether changes to rules would promote or impede competition.¹⁵ Since one of the primary purposes of the instant proceeding is to promote competition within the local loop, consistent regulatory treatment of similar mobile services would be in the public interest. For the same reasons, AirTouch supports Motorola’s recommendation that the Commission’s frequency allocation rules be amended to reflect that fixed services are permitted on all CMRS frequencies. Thus, all CMRS licensees, including cellular, narrowband PCS, and paging licensees, should be permitted the same flexibility as PCS licensees to provide fixed services while continuing to be regulated pursuant to Section 332.¹⁶

AirTouch does not agree with NCTA that there should be a distinction between rural and non-rural areas for purposes of the regulatory treatment of CMRS services, nor that there is a need for a “higher level of regulatory oversight” in rural areas. Contrary to NCTA’s argument, the Telecommunications Act of 1996 does not

¹³ H.R. Rep. No. 103-213, 103d Cong., 1st Sess. 494 (1993).

¹⁴ Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order, 9 FCC 7988, 8036 (1994)(hereinafter, CMRS Third Report and Order).

¹⁵ CMRS Third Report and Order, at 8037.

¹⁶ Sprint, PACS, and PCIA support inclusion of all narrowband CMRS providers in the fixed CMRS services market.

mandate disparate regulatory treatment depending on the location of the fixed services. As acknowledged by NCTA, the “rural” issue is relevant only in the universal service context. To the extent rural areas will be disproportionately impacted by administration of the Universal Service Fund, those issues should be addressed as part of the ongoing universal service proceeding.

Finally, AirTouch supports the request¹⁷ that the Commission clarify the Part 22 Rewrite Order¹⁸ regarding state certification for cellular providers of fixed services. The Part 22 Rewrite Order states that cellular providers must comply with any applicable state certification requirements when providing incidental fixed service. As discussed above, the Commission has already defined ancillary fixed services provided by CMRS carriers as an integral part of CMRS service. Thus, AirTouch requests that the Commission clarify that any such state certification requirements have been preempted by Section 332 of the Communications Act.

II. Section 332 provides that CMRS carriers should be continue to be regulated as CMRS providers until its service replaces landline service to a substantial portion of the public

The possibility that mobile service may replace traditional “wired” telephone service was addressed when Congress adopted the CMRS regulatory scheme. States can petition the Commission for authority to regulate CMRS providers, but only when a CMRS provider becomes a “substantial substitute” for landline service and other

¹⁷ Comments of the Alliance of LEC-Affiliated Wireless Services Providers, filed March 1, 1996, at 2-5.

¹⁸ Revision of Part 22 of the Commission’s Rules Governing the Public Mobile Service, Report and Order, 9 FCC Rcd 6513 (1994).

standards are met.¹⁹ The burden of proof is on the States to show that such regulation is in the public interest.²⁰ Further, Congress instructed the Commission that when it reviews State petitions for regulation, it should “be mindful of the Committee’s desire to give the policies embodied [sic] in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.”²¹ The Commission has properly interpreted the Act to express a preference for competition, rather than regulation.²² Only two and one half years have passed since Section 332 was amended, and very few PCS providers have begun providing commercial service. As the Commission concluded in its Annual Report to Congress, CMRS is not yet competitive with wireline telephone service.²³ It would therefore be premature and inappropriate to consider imposing additional regulatory requirements on CMRS providers.

Due to the same competitive concerns, the Commission should reject LDDS’ proposal to impose local exchange carrier regulation, including number portability and dialing parity requirements, on CMRS licensees.²⁴ Congress exempted CMRS providers from such requirements by expressly stating that CMRS providers are not local exchange carriers under the definition in the Telecommunications Act of 1996, except to

¹⁹ 47 U.S.C. 332(c)(3).

²⁰ Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates, 10 FCC Rcd 7486, 7493 (1995).

²¹ H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 261-62 (1993).

²² CMRS Second Report and Order at 1509.

²³ Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 10 FCC Rcd. 8844, 8869 (1995).

²⁴ Comments of LDDS Worldcom at 3-7.

the extent the Commission might at some future time find otherwise.²⁵ Since the instant proceeding does not address the issue of whether CMRS providers are local exchange carriers, it would be inappropriate for the Commission to impose local exchange carrier requirements. Imposing a separate regulatory structure on CMRS licensees providing wireless local loop service would increase costs to carriers and may impede competition in the wireless local loop, which is clearly not in the public interest.

Should the Commission decide that fixed wireless services must, under the Communications Act, be regulated differently than CMRS, AirTouch urges the Commission to use its forbearance authority under new Section 10(a) of the Act.²⁶ AirTouch submits that forbearance regarding such services is required because enforcement of any contrary statutory provision would not be necessary with respect to charges, practices,

²⁵ Section 3(a) of the Communications Act of 1934 (47 U.S.C. 153) was amended by the Telecommunications Act of 1996 to add a new Section 3(a)(44) to include the following definition:

“The term ‘local exchange carrier’ means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.” (Emphasis added).

²⁶ Specifically, Section 10(a) of the Act (added by Section 401(a) of the Telecommunications Act of 1996) states that the Commission must forbear from applying its regulations if it determines that:

“(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly unreasonable or discriminatory;
 (2) enforcement of such regulation is not necessary for the protection of consumers; and
 (3) forbearance from applying such provision or regulation is consistent with the public interest.”

classifications or regulations, nor to protect consumers, because competition in the local loop from wireless providers will itself assure that the rates charged are just, reasonable, and not unjustly discriminatory. In fact, forbearance would certainly be in the public interest since fixed wireless service will provide new, much needed competition in the local loop.

III. The Commission should regulate all CMRS carriers, including LEC-affiliated CMRS providers and cellular carriers, in a similar manner

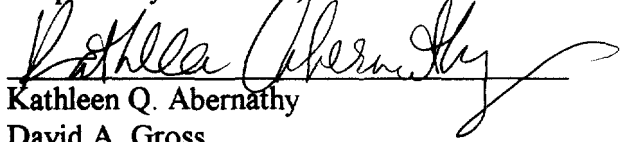
AirTouch disagrees with the New York State Department of Public Service in its suggestion that local exchange carriers (“LEC”) using CMRS spectrum for fixed local loop service should be regulated as LECs. As long as such fixed service is provided along with commercial mobile radio service, there is no need to distinguish between LEC providers of CMRS and other CMRS carriers. In fact, such differentiation between CMRS licensees is prohibited by Section 332 of the Act, which requires regulatory parity with respect to CMRS licensees.

CONCLUSION

CMRS licensees can provide fixed services and continue to be regulated within the CMRS regulatory framework. Section 332 and the Commission’s regulatory parity rulemaking proceedings have promoted a competitive environment for provision of a variety of CMRS services, including fixed services. The CMRS regulatory structure contains a mechanism whereby States can regulate CMRS-provided fixed services if and when such regulation is legally required and supportable. Further, the public interest will be served by uniformly regulating CMRS providers under the current regulatory regime

because it will promote competition, which will result in increased technological developments, rapid deployment of new services to the public, and result in lower prices.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathleen Q. Abernathy", written over a horizontal line.

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March 25, 1996

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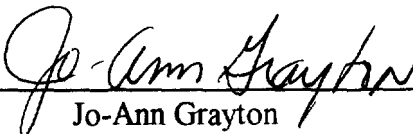
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